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Security Council

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## Letter dated 6 January 2012 from the Secretary-General addressed to the President of the Security Council

I have the honour to transmit the attached note verbale transmitted to me by the Registrar of the International Criminal Court (see annex), and its enclosures.

The letter of 13 December 2011 (enclosure I), signed by Sang-Hyun Song, President of the International Criminal Court, refers to the Security Council a finding, pursuant to article 87(7) of the Rome Statute, of a failure by the Republic of Chad to cooperate with the Court and accordingly transmits the decision of Pre-Trial Chamber I, also of 13 December 2011, entitled "Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir" (enclosure II).

The Registrar, pursuant to article 17(3) of the Relationship Agreement between the United Nations and the Court, submits the letter and the decision for onward transmission to the Council.

I should be most grateful if you would bring the present letter and its annex and enclosures to the attention of the members of the Security Council.

(*Signed*) **BAN** Ki-moon

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## Annex

### Note verbale dated 13 December 2011 from the Registrar of the International Criminal Court addressed to the Secretary-General

The Registrar of the International Criminal Court has the honour to transit for onward transmission to the Security Council, in accordance with article 17(3) of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, the letter signed by the President of the Court, on 13 December 2011, by which the President refers to the Security Council a finding, pursuant to article 87(7) of the Rome Statute, of a failure by the Republic of Chad to cooperate with the Court.

Should you have any questions or require additional information, you are invited to contact Alexander Khodakov, Special Adviser on External Relations and Cooperation, by e-mail (alexander.khodakov@icc-cpi.int), by telephone (+31 70 515 8662) or by fax (+31 70 515 8567, or Anne-Aurore Bertrand, Cooperation Adviser, Office of the Registrar, by e-mail (anneaurore.bertrand@icc-cpi.int) or by telephone (+31 70 515 8202).

## Enclosure I

Please be informed that Pre-Trial Chamber I of the International Criminal Court, acting in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, has found, in accordance with articles 86, 87(7) and 89 of the Rome Statute of the International Criminal Court, that the Republic of Chad has failed to comply with a request to cooperate, thereby preventing the Court from exercising its functions and powers.

Pursuant to regulation 109(4) of the Regulations of the Court, I hereby refer the matter to you and transmit the decision of Pre-Trial Chamber I.

(*Signed*) Sang-Hyun **Song**

## Enclosure II

Cour Pénale Internationale

International Criminal Court

Original: French

No.: ICC 02/05-01/09
Date: 13 December 2011

PRE-TRIAL CHAMBER I

Before:

Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sylvia Steiner
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

*THE PROSECUTOR V. OMAR HASSAN AHMAD AL BASHIR*

Public Document

Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**
Competent authorities of the Republic of Chad

**Amicus Curiae**

**Others**
The President of the Court

**REGISTRY**

**Registrar**
Ms. Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**
Mr. Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Others**

**Pre-Trial Chamber I** of the International Criminal Court (the "Chamber" and the "Court", respectively) hereby issues the present decision on the failure by the Republic of Chad to comply with the cooperation requests issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir ("Omar Al Bashir").

**Background and submissions by the Republic of Chad**

1. Where applicable to the present case, the Chamber refers to the background on the case contained in its "Decision Pursuant to article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir" (the "Decision concerning Malawi").

2. On 6 March 2009 and on 21 July 2010, respectively, the Registry sent, at the Chamber's request, the "Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir",[1] and the "Supplementary request to all States parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir"[2] (the "Cooperation Requests"). The Republic of Chad has been a party to the Rome Statute since 1 January 2007 and was therefore notified of the Cooperation Requests. It had previously allowed Omar Al Bashir to enter its territory from approximately 21 to 23 July 2010 without arresting him. The Chamber informed the Security Council of the United Nations and the Assembly of States Parties of this visit in a decision issued on 27 August 2010.[3]

3. In its Report on the second visit of Omar Al Bashir to Chad of 9 August 2011 ("the First Report of the Registry"),[4] the Registry informed the Chamber that, according to information reported in the media, Omar Al Bashir had visited Chad on 7 and 8 August 2011 to attend the inauguration ceremony of the Head of State of Chad, Idriss Deby Itno. On 5 August 2011, by note verbale contained in the annex to the First Report of the Registry, the Registrar reminded the Republic of Chad of its "obligation to arrest and transfer to the Court persons who are subject to an arrest warrant issued by the International Criminal Court, an obligation which applies to all persons subject to an arrest warrant issued by the Court, including President Al Bashir".[5]

4. On 18 August 2011, the Chamber issued its Decision requesting observations about Omar Al Bashir's recent visit to the Republic of Chad,[6] in which it called upon the relevant authorities of the Republic of Chad to submit, no later than Friday, 9 September 2011, any observations on the First Report of the Registry, in particular with regard to their alleged failure to comply with the Cooperation Requests issued by the Court.

5. In its Report of the Registry concerning the observations of the Republic of Chad, filed confidentially on 9 September 2011 ("the Second Report of the Registrar"),[7] the Registrar informed the Chamber that (i), the Embassy of Chad in Brussels had submitted the observations of the Minister for Foreign Affairs to the

[1] ICC-02/05-01/09-7-tFRA.
[2] ICC-02/05-01/09-96-tFRA.
[3] ICC-02/05-01/09-109-tFRA.
[4] ICC-02/05-01/09-131-Conf.
[5] ICC-02/05-01/09-131-Conf, annex 2.
[6] ICC-02/05-01/09-132-tFRA-Corr.
[7] ICC-02/05-01/09-133-Conf.

Registry on 7 September 2011; (ii) that the Republic of Chad's observations had, however, proved to be in reference to the Registrar's note verbale of 5 August 2011 transmitted in advance of Omar Al Bashir's visit to Chad and not to the Decision of the Chamber of 18 August 2011; (iii) and that, on 9 September 2011, the authorities of the Republic of Chad had indicated informally that they sought an extension of the time limit to respond to the 18 August 2011 Decision of the Chamber.

6. On 21 September 2011, the Chamber issued its Decision amending the time limit for the submission of observations on Omar Al Bashir's recent visit to the Republic of Chad,[8] in which it decided to extend until 30 September 2011 the time limit for the competent authorities of the Republic of Chad to submit their observations.

7. On 30 September 2011, the Registry submitted under the heading 'public' its Report of the Registry on the observations of the Republic of Chad,[9] which included a public annex. In this annex, entitled "Observations of the Republic of Chad", the Republic of Chad submitted the following observations:

> *"Recalling article 87(1) and its subparagraphs on cooperation requests and legal assistance,*
>
> *Considering the common position adopted by the African Union with respect to the international arrest warrant for Omar Al Bashir issued by the Prosecutor,*
>
> *Also considering that, in this instance, as [the Republic of Chad] is a member of the African Union, the Prosecutor's request cannot be fulfilled in the Republic of Chad, and that, in accordance with regulation 109-3 of the Regulations of the Court, the Republic of Chad must have the opportunity to be heard;*
>
> *Therefore [concludes] that the provisions of article 87(7) of the Statute, referred to in report no. ICC-02/05-01/09 of 18 August 2011, which read: 'Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council', are not applicable."*[10]

**Applicable Law and Discussion**

8. The Chamber notes articles 13, 21, 27, 86, 87, 89 and 119 of the Statute and rule 195 of the Rules of Procedure and Evidence (the "Rules").

9. As a preliminary matter, the Chamber notes that, although they received a warning by the Registry prior to the visit of Omar Al Bashir, the authorities of the Republic of Chad decided neither to respond to the Court nor to arrest the suspect. This indicates to the Chamber that the Republic of Chad did not respect its obligation, enshrined in article 86 of the Statute, to fully cooperate with the Court.

[8] ICC-02/05-01/09-134.

[9] ICC-02/05-01/09-135, with public annex 1.

[10] ICC-02/05-01/09-135, annex 1, p. 3.

10. The Republic of Chad did not respect the sole authority of this Court to decide whether immunities are applicable in a particular case. This is established by article 199(1) of the Statute, which provides that "[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court". Moreover, rule 195(1) states:

> *When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.*

11. Therefore the Chamber concludes that, in this respect, the Republic of Chad did not cooperate with the Court in order to resolve the issue. The Republic of Chad should have brought the matter to the attention of the Chamber, together with any available information, in order for the Chamber to make its determination.

12. That said, due to the significance of the issues before the Court, the Chamber will decide the issue of Chad's non-cooperation on the merits. The Republic of Chad does not indicate to which position of the African Union it alludes, but various resolutions of the African Union have prohibited its members from cooperating with the Court with respect to the warrant for the arrest of Omar Al Bashir.[11] The sole legal justification the African Union gives for why its legal position is compatible with the Statute is by reference to "the provisions of article 98 of the Rome Statute of the International Criminal Court relating to immunities".[12] The Chamber considers the specific provision referenced by the African Union to be article 98(1) of the Statute.

13. The Chamber notes that the Republic of Malawi has also invoked this position of the African Union to explain its failure to arrest Omar Al Bashir. In the Decision concerning Malawi, the Chamber concluded that the Republic of Malawi and the African Union were not entitled to rely on article 98(1) of the Statute. In the present case, the Chamber incorporates the conclusions set forth in the relevant paragraphs of the Decision on Malawi,[13] specifically:

> "*36. [...] Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to*

[11] African Union, Assembly, Decision on the Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) - Doc. Assembly/AU/13(XIII), 3 July 2009, Assembly/AU/Dec.245(XIII) Rev.1 ("3 July 2009 AU Decision"), para. 10; African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) - Doc. Assembly/AU/10(XV), 27 July 2010, Assembly/AU/Dec.296(XV), paras. 5-6; African Union, Assembly, Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX/CL/639(XVIII), 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; African Union, Assembly, Decision on the Implementation of the Assembly Decisions on the International Criminal Court-Doc.EX.CL/670(XIX), 30 June-1 July 2011, Assembly/AU/Dec.366(XVII) ("30 June-1 July 2011 AU Decision"), para. 5.

[12] 3 July 2009 AU Decision, para. 10; 30 June-1 July 2011 AU Decision, para. 5.

[13] Decision on Malawi, paras. 22 to 43.

*former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. [...]*

37. *The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.*

38. *First, [...] immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.*

39. *Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the "Arrest Warrant Case" was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the [International Court of Justice] majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.*

40. *Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these States have renounced any claim to immunity by ratifying the language of article 27(2): '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person.' Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.*

41. *Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising 'its jurisdiction over persons for the most serious crimes of international concern.' It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.*

42. *The Chamber considers that the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.*

43. *[...] the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of*

*State's arrest for the commission of international crimes. There is no conflict between Malawi's obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply."*

14. The Chamber is of the view that the Republic of Chad cannot invoke article 98(1) to justify its failure to comply with the Cooperation Requests. The Chamber therefore finds, in accordance with article 87(7) of the Statute, that the Republic of Chad has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the Security Council of the United Nations and to the Assembly of States Parties.

**FOR THESE REASONS, THE CHAMBER**

**FINDS**, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Chad: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir's immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

**NOTIFIES**, in accordance with regulation 109-4 of the Regulations of the Court, the President of the Court of this decision so that he may transmit it to the Security Council through the Secretary-General of the United Nations and to the Assembly of States Parties.

Done in both English and French, the French version being authoritative.

(*Signed*) **Judge Sanji Mmasenono Monageng**
**Presiding Judge**

(*Signed*) **Judge Sylvia Steiner** (*Signed*) **Judge Cuno Tarfusser**

Dated on 13 December 2011

At the Hague, The Netherlands